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19
20 **UNITED STATES DISTRICT COURT**
21 **CENTRAL DISTRICT OF CALIFORNIA**
22 **SOUTHERN DIVISION**

23 IN RE STEC, INC. SECURITIES
24 LITIGATION

25) No. SACV 09-01304-JVS (MLGx)

26)
27) **PLAINTIFFS' RESPONSE TO**
28) **DEFENDANTS' REQUEST FOR**
29) **JUDICIAL NOTICE**

30 This Document Relates to
31 **ALL ACTIONS.**

32) Hearing Date: January 10, 2011
33) Time: 1:30 p.m.
34) Courtroom: 10C

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1 **TABLE OF AUTHORITIES**

2 **Cases**

3 In re Wet Seal, Inc. Sec. Litig.,

4 518 F. Supp. 2d 1148 (C.D. Cal. 2007) 8

5 Plevy v. Haggerty,

6 38 F. Supp. 2d 816 (C.D. Cal. 1998) 9

7 San Francisco Patrol Special Police Officers v. City and County of San Francisco,

8 13 Fed. Appx. 670 (9th Cir. 2001) 3

9 Yanek v. Staar Surgical Co.,

10 388 F. Supp. 2d 1110 n. 11 (C.D. Cal. 2005) 4

11 **Rules**

12 Rule 201 of the Federal Rules of Evidence 2

1 Plaintiffs respectfully submit this response to Defendants' Request for
2 Judicial Notice ("RJN") filed in support of their motion to dismiss the
3 Consolidated Amended Complaint (the "Complaint").

4 **I. INTRODUCTION**

5 Defendants request that the Court take judicial notice of various voluminous
6 exhibits attached to the Declaration of Christopher W. Johnstone (the "Johnstone
7 Declaration") accompanying their motion to dismiss the Complaint. The exhibits
8 consist of certain documents that STEC, Inc. ("STEC" or the "Company") filed
9 with the Securities and Exchange Commission ("SEC"), the Company's press
10 releases, conference call transcripts, analyst reports, and historical stock prices.

11 As addressed herein, Plaintiffs generally do not oppose the Court taking
12 judicial notice of the existence of certain of these documents, where the document
13 at issue is expressly relied on in the Complaint. Defendants' attempt, however, to
14 introduce irrelevant and extraneous documents that are not mentioned in the
15 Complaint should be rejected. Indeed, "[t]he Court should not use judicial notice
16 to generate an evidentiary record and then weigh evidence- which plaintiffs have
17 not had the opportunity to challenge- to dismiss plaintiffs [sic.] complaint." *In re*
18 *Network Equip. Techs., Inc. Litig.*, 762 F. Supp. 1359, 1363 (N.D. Cal. 1991).

19 **II. ARGUMENT**

20 **A. APPLICABLE STANDARDS**

21 There is no doubt that "extraneous evidence should not be considered in
22 ruling on a motion to dismiss." *Arpin v. Santa Clara Valley Transp. Agency*, 261
23 F.3d 912, 925 (9th Cir. 2001); *see also Lee v. City of Los Angeles*, 250 F.3d 668,
24 688 (9th Cir. 2001) ("[W]hen the legal sufficiency of a complaint's allegations is
25 tested by a motion under Rule 12(b)(6), '[r]eview is limited to the complaint.'")
26 (citation omitted). If, on a motion to dismiss, the Court considers extrinsic
27 documents outside of the complaint, the motion is converted to one for summary
28 judgment, and "[a]ll parties must be given a reasonable opportunity to present all

1 the material that is pertinent to the [Rule 56] motion.” Fed. R. Civ. P. 12(d).

2 There are, however, two exceptions to the rule that outside evidence may not
3 be considered. First, the Court may take judicial notice of matters of public record
4 to the extent permitted by Rule 201 of the Federal Rules of Evidence. *Lee*, 250
5 F.3d at 688-689. Pursuant to Fed. R. Evid. 201, courts may take judicial notice of
6 documents that are (i) generally known within the territorial jurisdiction of the trial
7 court, or (ii) capable of accurate and ready determination by resort to resources
8 whose accuracy cannot reasonably be questioned. Second, courts may consider
9 under the “incorporation by reference” doctrine, documents that are either
10 submitted as part of the complaint or that are necessarily relied on in a complaint
11 and whose authenticity is not contested. *Lee*, 250 F.3d at 688.

12 **B. DEFENDANTS PROFFER SOME DOCUMENTS FOR
13 IMPROPER AND IRRELEVANT PURPOSES**

14 As Defendants do in their RJN, Plaintiffs address each category of
15 documents submitted by Defendants specifically and in turn.

16 **1. Press Releases**

17 Defendants request that the Court judicially notice various press releases
18 attached to the Johnstone Declaration at Exhibits H (November 10, 2008), I
19 (March 12, 2009), J (May 11, 2009), K (June 16, 2009), L (August 3, 2009), M
20 (November 3, 2009), N (February 23, 2010), AA (May 29, 2009) and DD (July 16,
21 2009). (RJN at 3-4.) According to Defendants, “Plaintiff quotes extensively, but
22 selectively, from many of these press releases.” (*Id.* at 3.)

23 This is simply not true. The Complaint does not contain even the slightest of
24 references to the press releases attached as exhibits H, I, J, L, M and AA. As such,
25 those press releases are completely outside the scope of judicial notice and should
26 not be considered for any purpose. *San Francisco Patrol Special Police Officers v.*
27 *City and County of San Francisco*, 13 Fed. Appx. 670, 675 (9th Cir. 2001)
28 (reasoning that, for “incorporation by reference” doctrine to apply, material must

1 be “necessarily relied upon by the plaintiff’s complaint”); *Pearce v. Bank of Am.*
2 *Home Loans*, No. C 09-3988 JF, 2010 WL 689798, at *3 (N.D. Cal. Feb. 23, 2010)
3 (holding that document was outside the scope of the “incorporation by reference
4 doctrine” as contents were not alleged in complaint).

5 Moreover, Defendants have not made any showing that these extraneous
6 press releases are relevant to any matter alleged in the Complaint. For this
7 additional reason, the request for judicial notice should be denied. *E. & J. Gallo*
8 *Winery v. EnCana Energy Servs., Inc.*, CVF03-5412AWILJO, 2005 WL 2435900,
9 at *6 (E.D. Cal. Sept. 30, 2005) *aff’d sub nom. E. & J. Gallo Winery v. EnCana*
10 *Corp.*, 503 F.3d 1027 (9th Cir. 2007) (refusing to take judicial notice of irrelevant
11 press release).

12 With respect to Exhibits K, N and DD, which are specifically referred to in
13 the Complaint, Plaintiffs do not object to the Court’s consideration of these
14 exhibits and join in Defendants’ motion.

15 **2. SEC Filings**

16 Defendants seek to introduce the following exhibits containing various
17 STEC SEC filings: A (2009 Form 10-K, filed February 23, 2010), C (Form 10-Q
18 for period ending March 31, 2009, filed May 11, 2009), D (Form 10-Q for period
19 ending June 30, 2009, filed August 3, 2009), E (Form 10-Q for period ending
20 September 30, 2009, filed November 3, 2009), G (2008 Form 10-K, filed March
21 12, 2009), EE (Form 10-Q for period ending June 30, 2010, filed August 3, 2010),
22 HH (2007 Form 10-K, filed March 17, 2008). (RJN at 4-5.) All are referenced in
23 the Complaint except for Exhibits EE and HH. (See, e.g., Compl. ¶¶ 26, 64, 123,
24 239.) Plaintiffs do not object to the Court’s consideration of Exhibit EE, the Form
25 10-Q for the second quarter of 2010.

26 Exhibit HH, STEC’s 2007 Form 10-K, should not be considered. Nowhere
27 is Exhibit HH mentioned in the Complaint. Thus, the incorporation by reference
28 doctrine does not apply. Even if Exhibit HH were mentioned, it should still not be

1 considered. While courts may consider SEC filings in connection with a motion to
2 dismiss, those filings must be relevant to the issues in the case. *Yanek v. Staar*
3 *Surgical Co.*, 388 F. Supp. 2d 1110, 1127 n. 11 (C.D. Cal. 2005) (excluding
4 Company's Form 8-K from consideration under the doctrine of judicial notice
5 because the filing "references events exclusively outside of the Class Period and is
6 also irrelevant to the determination of the Motion to Dismiss."); *see also In re*
7 *Immune Response Secs. Litig.*, 375 F. Supp. 2d 983, 996 (S.D. Cal. 2005) (judicial
8 notice of exhibits denied because court found them "irrelevant in deciding the
9 [m]otions"); *In re Calpine Corp. Secs. Litig.*, 288 F. Supp. 2d 1054, 1076-77 (N.D.
10 Cal. 2003) (court declined to take judicial notice of documents that were not
11 referenced in a complaint and not relevant).

12 Here, the 2007 Form 10-K attached as Exhibit HH precedes the Class Period
13 by over two years and is not relevant to Plaintiffs' allegations or the issues
14 presented by Defendants' dismissal motion. Exhibit HH should be stricken.

15 With respect to the remaining SEC filings that are the subject of Defendants'
16 RJN, Plaintiffs join in Defendants' motion. If the Court considers the Company's
17 SEC filings, it should consider those filings in their entirety rather than the
18 excerpts provided by Defendants. To that end, Plaintiffs attach to the
19 accompanying Declaration of Allyn Z. Lite the complete versions of the relevant
20 SEC filings.¹

21 3. **Prospectus and Prospectus Supplement**

22 Defendants request that the Court take judicial notice of excerpts from
23 STEC's September 29, 2000 and October 24, 2003 prospectuses and August 3,
24 2009 Prospectus Supplement (Exhibits U, V and BB). (RJN at 5-6.) Of these
25 documents, only the contents of the August 3, 2009 filing (Exhibit BB) are alleged
26

27 1 Plaintiffs also attach copies of the Company's Forms 10-Q for the third quarter of
28 2008 and the first quarter of 2010.

1 in the Complaint. (See, e.g., Compl. ¶ 240.) Plaintiffs do not object to the Court
2 taking judicial notice of Exhibit BB.

3 STEC's September 29, 2000 and October 24, 2003 filings should be
4 excluded. As set forth above, because Exhibits U and V are not mentioned in the
5 Complaint, the incorporation by reference doctrine does not apply and these
6 documents are outside the doctrine of judicial notice. Furthermore, these Exhibits
7 precede the Class Period in this matter (June 16, 2009 - February 23, 2010) by
8 nearly nine and six years, respectively, and there is no indication that they are
9 remotely relevant to this motion. To the extent that Defendants introduce these
10 documents only to show the beneficial ownership of STEC securities by Mark and
11 Manouch Moshayedi, Plaintiffs object on the same basis as is set forth below with
12 respect to the Schedules 13G/A.

13 **4. Schedules 13G/A, SEC Correspondence, Earnings Call
14 Transcripts**

15 Plaintiffs do not object to the Court taking judicial notice of Exhibits W, X,
16 Y and Z- the Schedules 13G/A reflecting Mark and Manouch Moshayedi's
17 beneficial ownership of STEC securities that were filed with the SEC. (See RJD at
18 6-7.) Plaintiffs do oppose the Court's consideration of these documents to the
19 extent that defendants "offer the documents to provide a complete picture of
20 defendants' trading activity" to argue the merits of Plaintiffs' insider trading
21 allegations. *Patel v. Parnes*, 253 F.R.D. 531, 546 (C.D. Cal. 2008).

22 With respect to the SEC correspondence attached as Exhibits S (8/28/09
23 letter), FF (9/10/09 letter) and GG (10/13/09 letter), Plaintiffs do not object to the
24 Court's consideration of the existence of these documents, which are referred to in
25 the Complaint. (See, e.g., Compl. ¶¶ 74, 76, 78.)

26 With respect to the letter from the SEC dated October 20, 2009 and attached
27 as Exhibit T, however, Defendants' assertion that Plaintiffs "reference[] and
28 selectively quote[] from this correspondence" is false. (See RJD at 7.) Nowhere

1 is Exhibit T referred to in the Complaint. Thus, the incorporation by reference
2 doctrine does not apply.

3 Plaintiffs do not object to Defendants' request to take judicial notice of the
4 conference call transcripts dated August 3, 2009, November 3, 2009 and February
5 23, 2010 attached as Exhibits B and O. (See RJD at 7-8.) With respect to these
6 transcripts, Plaintiffs join in Defendants' motion.

7 **5. Analyst Reports**

8 Defendants request judicial notice of various analyst reports attached to the
9 Johnstone Declaration at Exhibits P (a March 25, 2009 analyst report by Stifel
10 Nicolaus), Q (a June 16, 2009 analyst report by Thomas Weisel Partners), R
11 (internet article dated July 2, 2009 containing report by Avian Securities), and CC
12 (a September 17, 2009 analyst report by Wedbush). (See RJD at 8-9.) The
13 Complaint plainly does not rely on "most" of these documents, as Defendants
14 claim. (*Id.* at 8.) Rather, of these reports, the only one referred to in the Complaint
15 is the September 17, 2009 report of Wedbush attached as Exhibit CC. (See, e.g.,
16 Compl. ¶ 143.) Plaintiffs do not object to the consideration of Exhibit CC.

17 Defendants' assertion that it is proper for the Court to consider analyst
18 reports not referred to in the Complaint is erroneous. As acknowledged by
19 Defendants' own authority (RJD at 9), the Court may take judicial notice of analyst
20 reports "*where they are relied upon by the complaint.*" *In re Wet Seal, Inc. Sec.*
21 *Litig.*, 518 F. Supp. 2d 1148, 1157 (C.D. Cal. 2007) (emphasis added). Here,
22 Plaintiffs did not rely on Exhibits P, Q, or R anywhere. Moreover, there is no
23 indication that these other analyst reports are remotely relevant to Defendants'
24 motion to dismiss.

25 This was the exact issue addressed in *Plevy v. Haggerty*, 38 F. Supp. 2d 816,
26 821 (C.D. Cal. 1998), where a judge of this Court declined to take judicial notice
27 of five additional analyst reports not cited in the Complaint. In *Plevy*, the Court
28 rejected the defendants' argument that the extraneous reports should be considered

1 “for the sake of completion,” finding them wholly irrelevant to defendants’ motion
2 to dismiss. This Court should similarly so find here and strike Exhibits P, Q and R.

3 **6. Historical Stock Prices**

4 Plaintiffs do not take issue with the assertion that stock prices can be subject
5 to judicial notice. Here, Defendants request that the Court take judicial notice of
6 Exhibit F, historical stock price quotes on Yahoo!, to establish that STEC’s stock
7 price rose to \$42.50 per share in the five weeks following the Secondary Offering.
8 (See RJN at 8.) To the extent that Defendants’ request argues for an inference that
9 Defendants Mark and Manouch did not commit insider trading because they did
10 not obtain the most favorable price for their shares (see RJN at 5 and Defs.’ Mem.
11 in Support of Mot. to Dismiss at 6, 20), Plaintiffs object to the purpose for which
12 such stock prices are offered here.²

13 **III. CONCLUSION**

14 In sum, Plaintiffs join in Defendants’ request for judicial notice of the
15 following documents, except, however, that Plaintiffs request that the entirety of
16 each such document be so noticed:

17

- 18 • The press release attached as DD;
- 19 • The SEC Forms 10-K and 10-Q attached as Exhibits A, C, D, E, G
and EE; and
- 20 • The conference call transcripts attached as Exhibits B and O.

21 Plaintiffs do not oppose the Court taking judicial notice of relevant
22 documents relied on in the Complaint or otherwise. Accordingly, Plaintiffs do not
23 object to the Court taking judicial notice of the following documents:

24

- 25 • The press releases attached as Exhibits K and N;

26

27

28 ² In their moving papers, Defendants do not ask the Court to draw factual
inferences regarding the causes of movements in STEC’s stock price throughout
the Class Period. To the extent that Defendants attempt to do so on reply, any such
attempt should be rejected.

- 1 • The prospectus supplement attached as Exhibit BB;
- 2 • The Schedules 13G/A attached as Exhibits W, X, Y and Z;
- 3 • The SEC correspondence attached as Exhibits S, FF and GG;
- 4 • The analyst report attached as Exhibit CC, and;
- 5 • The list of historical stock prices attached as Exhibit F.

6 As to those documents that are irrelevant and not relied on in the Complaint,
7 Plaintiffs respectfully request that the Court strike the following documents from
8 the record and all related references thereto:

- 9 • The press releases attached as Exhibits H, I, J, L, M and AA;
- 10 • The SEC filing attached as Exhibit HH;
- 11 • The prospectuses attached as Exhibits U and V, and;
- 12 • The SEC correspondence attached as Exhibit T and the analyst reports
13 attached as Exhibits P, Q and R.

14 Dated: October 25, 2010

15 Respectfully submitted,

16 By: /s/ Christopher Kim

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